

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION



In re: } Chapter 11
GS Industries, Inc. et al., } Case No. 01-30319 (GRH)
Debtors. } Jointly Administered

JUDGEMENT ENTERED ON SEP 26 2001

**ORDER DENYING MOTIONS FOR CLASS CERTIFICATION AND DISALLOWING
CLASS PROOFS OF CLAIM**

This matter is before the court on three motions for class certification ("Class Certification Motions") and three purported "class" proofs of claim ("Burgess Class Proofs of Claim") filed on behalf of various purported class members related to three lawsuits pending in South Carolina state court (collectively referred to as the "Burgess Plaintiffs"). The debtors and the Official Committee of Unsecured Creditors (the "Committee") timely objected to the Class Certification Motions and the Burgess Class Proofs of Claim. A hearing was held on September 12, 2001. Jurisdiction is proper pursuant to 28 U.S.C. §§ 157 and 1334. The court has considered the parties' pleadings, the record in this case, and the arguments of counsel.

For the reasons stated below, the court has concluded that the Class Certification Motions should be denied and the Burgess Class Proofs of Claim disallowed and expunged.

FACTS

1. In June and July 1998, three purported class actions--
Burgess v. Georgetown Steel Corp., Case No. 98-CP-22-385;
Cunningham v. Georgetown Steel Corp., Case No. 98-CP-22-414; and
Hutchins v. Georgetown Steel Corp., Case No. 98-CP-22-450
(collectively referred to as the "Burgess Litigation")--were
filed against Georgetown Steel Corporation ("GSC") in South
Carolina state court alleging property damage purportedly caused
by "mill dust" from GSC's Georgetown, South Carolina steel mill.
According to the complaints, the "mill dust" "causes immediate
and severe damage" to the relevant property "by pitting and
destroying the paint, chrome, finish, [woodwork, brick], windows,
and other parts of the [structure]" and "causes permanent
discoloration to the areas to which it attaches and causes severe
deterioration to the structure." The proposed classes were,
respectively, real property owners, car owners, and boat owners
within a five-mile radius of GSC's facility. No motion for class
certification was ever filed in the state court actions, and no
class was certified.

2. Local newspapers¹ printed numerous articles² about the

¹ The Georgetown Times is the local newspaper in Georgetown, South Carolina, the location of the GSC steel mill and of the putative class plaintiffs. The Myrtle Beach Sun-News is a local newspaper. Both papers are of general circulation in Georgetown, South Carolina.

² See "Steel mill civil suit pending," The Georgetown Times, at 1 (June 8, 1998); "Steel mill under fire," The Georgetown Times, at 1 (June 19, 1998); "Neighbors of steel mill file lawsuit," The

Burgess Litigation, and according to the lead named plaintiff in the Burgess action, "[t]here was a lot of publicity about the lawsuits just prior to and after they were filed."

3. On February 7, 2001 (the "Petition Date"), the debtors filed voluntary Chapter 11 petitions.

4. On May 11, 2001, the debtors filed a motion to establish July 27, 2001, as the bar date for filing proofs of claim. No party in interest objected, and the court entered a May 30, 2001, order establishing July 27, 2001 as the bar date.

5. As part of the bar date notification process, the debtors compiled a list of all known real property owners within a five-mile radius of GSC's plant. This list was incorporated into the mailing matrix of parties who were to receive notice of the bar date.

6. During the first week of June 2001, Bankruptcy Services, LLC--as servicing agent for the debtors--sent proof of claim forms and notice of the bar date to 28,574 creditors and

Myrtle Beach Sun-News, at 1D (June 20, 1998); "From ecstasy to agony," The Georgetown Times, at 1 (June 24, 1998); "GSC hit with second lawsuit," The Georgetown Times, at 1A (July 8, 1998); "GSC has given back more than it has taken," The Georgetown Times; "Column on lawsuit draws response from attorney," The Georgetown Times (July 8, 1998); "GSC faces third lawsuit," The Georgetown Times, at 16 (July 17, 1998); "A mill under siege," The Georgetown Times, at 1 (July 20, 1998); "Killing the goose that lays the golden egg," The Georgetown Times (July 31, 1998); "Georgetown Steel requests end to lawsuit," The Myrtle Beach Sun-News (August 29, 1998); "Steel mill requests dismissal of lawsuits," The Georgetown Times, at 1 (August 31, 1998); "Red stain lawsuits on hold," The Georgetown Times (February 27, 2001); "Red Dust a Cloudy Issue," The Myrtle Beach Sun-News, at 1A (March 8, 2001).

parties in interest listed on the debtors' mailing matrix at a cost of approximately \$36,000. In addition, Bankruptcy Services published the bar date notice in seven newspapers, including The Georgetown Times, and The Myrtle Beach Sun-News, at a cost of \$16,583.24.

7. After the bar date notices were mailed, The Georgetown Times ran several articles informing potential creditors of the Bar Date and the need to file proofs of claim. See "Claims deadline set for July 27 in steel mill case," The Georgetown Times, at 1 (July 23, 2001); "Specialists hired to help plaintiffs in 'red stain' suit," The Georgetown Times (July 2, 2001); "Mailboxes filled with GSC notices," The Georgetown Times (June 18, 2001).

8. On June 25, 2001, the named Burgess plaintiffs filed a motion to extend the bar date, and the debtors and Official Committee of Unsecured Creditors objected. The court conducted a hearing on July 11, 2001, and denied the motion. The order denying the extension of the bar date was not appealed.

9. On July 27, 2001, the bar date, the Burgess Plaintiffs filed the instant Class Certification Motions. In addition, proofs of claim were filed on behalf of the Burgess Plaintiffs with Bankruptcy Services, LLC. The Burgess Class Proofs of Claim list as creditors:

<u>State Court Case</u>	<u>Alleged Creditor</u>	<u>Claim Amount</u>
<u>Burgess v. Georgetown Steel Corp.</u> , Case No. 98-CP-22-385	"All persons who own real property with improvements (residential or commercial) located within a five (5) mile radius of the Defendant's steel mill located in downtown Georgetown, South Carolina."	\$120,000,000.00
<u>Hutchins v. Georgetown Steel Corp.</u> , Case No. 98-CP-22-450	<p>"A. All persons who live within a five (5) mile radius of the Defendant's steel mill and own a water-craft.</p> <p>B. Also those persons who own a water-craft and keep, board and/or store a water-craft within a five (5) mile radius of the steel mill."</p>	\$40,000,000.00
<u>Cunningham v. Georgetown Steel Corp.</u> , Case No. 98-CP-22-414	"All persons who own motor vehicles and reside within a five (5) mile radius of the Defendant's steel mill located in downtown Georgetown, South Carolina."	\$24,000,000.00

10. Each of the named plaintiffs in the three lawsuits filed an individual proof of claim, collectively totaling \$805,000. Out of the approximately 10,000 potential class members,³ only about fifty-seven other proofs of claim relating to the Burgess Litigation were filed .

³ The Burgess Plaintiffs originally alleged that the class was "comprised of over 15,000 persons." Rule 2019 Verified Statement of Ron Jones, at 3 (April 13, 2001). This number was later amended to total "approximately 10,000 persons." Rule 2019 Verified Statement of Christy Gruenloh, at 3 (September 10, 2001).

11. On August 14, 2001, as part of a telephonic scheduling order, the court bifurcated the proceedings on the class certification issue and permitted counsel for the debtors to file a brief solely addressing *procedural* objections to the Class Certification Motions. The merits of class certification were reserved for briefing and hearing at a later date, as necessary.

12. The debtors filed an objection to the Class Certification Motions and the Burgess Class Proofs of Claim on August 20, 2001.

13. On September 4, 2001, the Committee filed a response joining in the debtors' objection.

14. On September 10, 2001, the Burgess Plaintiffs filed a response to the debtors' objection.

15. The court conducted a hearing on September 12, 2001, at which counsel for the Burgess Plaintiffs, counsel for the debtors and counsel for the Committee presented oral argument.

ANALYSIS

I. Equality and Due Process

A. Notice to Purported Class Members.

16. Notice to the purported class members appears adequate. The debtors spent considerable time and resources to give actual notice of the bar date to all purported class claimants in the Burgess Litigation. Property owners in Georgetown were sent notices and proof of claim forms, and the debtors published notices in the local papers. In addition to the debtors'

efforts, a number of newspaper articles appeared in the local paper discussing the Bar Date and the requirement for filing proofs of claim. In several of these articles, plaintiffs' counsel urged citizens to seek the assistance of counsel if they believed they had a potential claim or face losing their claims forever. See "Claims deadline set for July 27 in steel mill case," The Georgetown Times, at 1 (July 23, 2001).

17. Despite these events, the Burgess Plaintiffs contend that many alleged class members "never received actual notice or constructive notice of the bar date." This allegation is not supported by the record. The Burgess Plaintiffs failed to submit evidence of any purported class member who did not receive notice, and have failed to present any evidence of interest in the amorphous, non-existent class. The only evidence submitted by the Burgess Plaintiffs was the affidavit of Tressa Star Edwards, in which Ms. Edwards stated that she received actual notice from the debtors and filed an individual proof of claim. See Edwards Affidavit (attached to Burgess Plaintiffs' Response Brief).

18. Based upon the actual notices mailed, the manner in which the debtors compiled the mailing matrix, the notices which were published in local and national newspapers, the news stories run by The Georgetown Times, and the lack of evidence to the contrary, the court finds that all alleged members of the purported classes in the three lawsuits received actual and/or

constructive notice of the bar date.

B. Equality among Similarly Situated Creditors.

19. "The policy of the bankruptcy law to treat creditors in the same classifications equally is central to the Bankruptcy Code." In re Superior Siding & Window, Inc., 14 F.3d 240, 243 (4th Cir. 1994). The purported members of the class actions received actual and constructive notice of the bar date and should be held to the same requirements as other creditors. Allowing purported class members who received notice but failed to timely file proofs of claim to participate in a class proof of claim would unfairly extend the bar date for a limited number of creditors. Such a result would contravene the equality mandated by the Bankruptcy Code and unfairly prejudice those creditors who timely filed individual proofs of claim.

20. Several courts have reached a similar result. In In re Bicoastal Corp., 133 B.R. 252 (Bankr. M.D. Fla. 1991), plaintiffs brought a purported class action in federal district court on behalf of all persons who purchased stock during a nine-year period. 133 B.R. at 253. Before a class was certified, Bicoastal filed a Chapter 11 bankruptcy petition. Id. The court established a bar date, actual notice was sent to all parties of interest, and further notice was published in numerous newspapers. Id. at 254. Plaintiffs filed a class proof of claim prior to the bar date, and subsequently filed a motion for class certification. Id. In denying both the motion and the class

proof of claim, the court stated:

[I]t is without dispute that the 'members' of the purported class received more than ample and adequate notice of the bar date, and they nevertheless failed to timely file their respective claims. Clearly they are now barred to present their individual claims; to permit the Claimants to file a claim as members of a class would enable them to accomplish indirectly what they could not accomplish directly.

Id. at 255 (emphasis added).

21. Similarly, in In re Sacred Heart Hospital of Norristown, 177 B.R. 16 (Bankr. E.D. Pa. 1995), the Chapter 11 debtor mailed proofs of claim and notice of the bar date to all former employees and published notice of the bar date in several newspapers. 177 B.R. at 19-20. Shortly before the bar date, an attorney filed a motion seeking class certification of all former hospital employees, and asking leave to file a class proof of claim. Id. After noting that (a) the class had not previously been certified, and (b) all of the purported members of the class had received notice of the bar date, the court stated:

Known claimants of all kinds who have received actual notice of the bar date must proceed through the claims process on a level playing field. Tinkering with an established bar date may raise due process claims of parties who have timely filed claims by originally-established bar dates, since it gives late filers a second bite at an apple which is likely to be less than fully satisfying, and thus effect unfair diminution of the timely filer's share of a distribution. . . . [A class claim and motion] which expands the bar date for notified creditors may itself violate due process.

Id. at 22-23 (emphasis added). The court emphatically denied certification:

[I]t is manifestly clear that *it would be unwarranted, unfair, and possibly violate the due process rights of other creditors of the Debtor to effectively extend the bar date to benefit (1) the members of the putative class who failed to exercise vigilance; and (2) the pocketbook of the putative class's counsel, who obviously will seek a contingency fee from all unnamed class members who fail to opt out of the putative class.*

Id. at 24 (emphasis added).

22. In re FirstPlus Financial, Inc., 248 B.R. 60 (Bankr. N.D. Tex. 2000) reached the same conclusion under similar facts. After actual and constructive notice of the bar date was sent to all members of the purported class, plaintiffs filed a class proof of claim and sought class certification. 248 B.R. at 66-67. In denying both, the court noted the serious concerns which would arise from recognizing a class proof of claim:

[W]ere the Court to allow the class proof of claim to stand, such action would allow a second bite at the apple for those creditors who received notice of the bankruptcy filing and of the Claims Bar Date, and who chose not to file. Such a result would be inequitable to the Debtor's other creditors who are bound by the bar date. It would also be inequitable within the proposed class since approximately 2,000 of those people, recognizing their rights and concomitant duties as creditors of the Debtor, filed their individual proofs of claim.

Id. at 60 (emphasis added). See also In re Jamesway Corp., 1997 WL 327105 (Bankr. S.D.N.Y. June 12, 1997) (denying class

certification and class proof of claim because certification would effectively extend the bar date to employees who had not timely filed WARN Act claims without a showing of excusable neglect); In re Texaco, Inc., 81 B.R. 820 (Bankr. S.D.N.Y. 1988) (holding that claims of class members who failed to file individual proofs of claim could not be consolidated into class claim).

23. The due process argument is enhanced in this case because the court has previously denied a request by the Burgess Plaintiffs to indefinitely extend the bar date. The stated purpose for seeking that extension was to review insurance information, not to seek class certification. The Burgess Plaintiffs did not appeal from the order denying the extension. The Class Certification Motions are merely an attempt to re-litigate the denial of the request to extend the bar date.

C. Timing of the Class Certification Motions.

24. The court further finds that the timing of the Class Certification Motions weighs in favor of denial. Ordinarily, certification of a class should be resolved "[a]s soon as practicable after the commencement of an action." Fed. R. Civ. P. 23(c)(1); S.C. R. Civ. P. 23(d)(1). In the present situation, the Burgess litigation was pending since June and July 1998, and the current bankruptcy was ongoing for more than half a year before the Burgess Plaintiffs filed their motions for class certification, which were--even then--only filed on the bar date.